IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JERRY LEE DENSON JR.,
Appellant.

No. 2 CA-CR 2018-0324
Filed September 18, 2019

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Appeal from the Superior Court in Pima County
No. CR20151923003
The Honorable Kenneth Lee, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
By Joshua C. Smith, Assistant Attorney General, Phoenix
Counsel for Appellee

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MEMORANDUM DECISION

Judge Brearcliffe authored the decision of the Court, in which Presiding Judge Staring and Chief Judge Vásquez concurred.

B R E A R C L I F F E, Judge:

¶1 Jerry Denson appeals from his jury convictions for one count of possession of narcotic drugs for sale, one count of possession of a dangerous drug for sale, one count of possession of marijuana for sale, one count of possession of drug paraphernalia, and four counts of possession of a deadly weapon during the commission of a felony drug offense.[1] The trial court sentenced him to concurrent prison terms, the longest of which is five years. We affirm.

Factual and Procedural Background

¶2 The sole issue on appeal is the propriety of the search warrant that led to Denson's arrest and the charges against him. Denson contends the trial court abused its discretion when it denied his motion to suppress evidence obtained with a search warrant because the warrant lacked probable cause. We consider only the evidence presented at the suppression hearing, viewing the facts in the light most favorable to sustaining the trial court's ruling. *State v. Goudeau*, 239 Ariz. 421, ¶ 26 (2016).

¶3 In February 2015, Arizona Department of Public Safety Officer Theodore Edwards, who is assigned to the Counter Narcotics Alliance, met an individual, Gil, and, in exchange for $40, asked for two pieces of crack cocaine. Gil got into Edwards' vehicle and directed the officer to drive to the corner of 30th Street and South Park Avenue in Tucson, where he got out of the car, and told Edwards to pick him up a block away. Other officers saw Gil walk into the Half Full Smoke Shop, which Denson owns. When he returned, Gil gave Edwards crack cocaine.

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[1]Two additional counts of possession of narcotic drugs for sale were dismissed prior to, and during, trial.

¶4 In March 2015, Edwards entered the Half Full Smoke Shop and approached Denson, who was at the counter. Edwards asked Denson for cocaine, and Denson said he "didn't have it." Edwards interpreted it to mean Denson was out of cocaine.

¶5 Later that night, Edwards met a different person, Mike, and asked him for two pieces of crack cocaine in exchange for $40. Mike introduced Edwards to Harpo, who said he would take the officer to get cocaine. They first drove to a home, where Harpo got out of the vehicle. When he returned, Harpo told Edwards he could not buy the cocaine there, and that they would have to go to "the smoke shop." They drove to the area of the Half Full Smoke Shop, and Harpo got out of the vehicle. Another undercover officer followed him inside the smoke shop, watched Harpo go into what appeared to be a back room not open to the public, and then leave the store. When Harpo returned to Edwards' vehicle, he gave Edwards cocaine. The next morning, Edwards obtained a telephonic search warrant for the Half Full Smoke Shop based on the events in February and the previous night.

¶6 Denson filed a motion to suppress and requested a *Franks* hearing.[2] He argued that, when requesting the search warrant, the officer recklessly made at least one "material misstatement and several omissions," and therefore the search warrant should be suppressed.[3] Denson additionally argued that, even if there was no *Franks* violation, the warrant was facially deficient. The trial court did not rule specifically on the alleged *Franks* violation, but found probable cause for the issuance of the warrant.

¶7 Denson was convicted and sentenced as described above. We have jurisdiction under A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

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[2]Under *Franks v. Delaware*, 438 U.S. 154 (1978), a defendant may challenge the validity of a search warrant by asserting that the affidavit supporting the warrant application contains an intentional or reckless misstatement or omission of a material fact.

[3]Because Denson does not argue a *Franks* violation on appeal, we consider it abandoned and waived. *See State v. Moody*, 208 Ariz. 424, n.9 (2004).

Analysis

¶8 We review for an abuse of discretion the trial court's ruling on a motion to suppress. *Goudeau*, 239 Ariz. 421, ¶ 26. The Fourth Amendment requires that search warrants be issued upon a showing of probable cause supported by an oath or affirmation. U.S. Const. amend. IV. Arizona provides similar protections. *See* Ariz. Const. art. II, § 8 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law."); A.R.S. § 13-3913 ("No search warrant shall be issued except on probable cause, supported by affidavit . . . ."). That is, to obtain a search warrant, a law enforcement officer must support the request for a warrant with sufficient information demonstrating that a crime probably has occurred or is occurring, and that the search is calculated to uncover evidence of that crime. *See State v. Sisco*, 239 Ariz. 532, ¶ 8 (2016).

¶9 "Probable cause exists when the facts known to a police officer 'would warrant a person of reasonable caution in the belief that contraband or evidence of a crime is present.'" *Id*. (quoting *Florida v. Harris*, 568 U.S. 237, 243 (2013)). "An officer has probable cause to conduct a search if a reasonably prudent person, based upon the facts known by the officer, would be justified in concluding that the items sought are connected with the criminal activity and that they would be found at the place to be searched." *State v. Buccini*, 167 Ariz. 550, 556 (1991). "The facts need not show it is more likely than not that contraband or evidence of a crime will be found . . . all that is required is the kind of fair probability on which reasonable and prudent people, not legal technicians, act." *Sisco*, 239 Ariz. 532, ¶ 8 (internal quotations omitted). Once issued by a magistrate, search warrants are presumed valid and we defer to the magistrate's probable cause determination. *Buccini*, 167 Ariz. at 558. However, a defendant may challenge a search warrant if it is based on false or incomplete information. *Frimmel v. Sanders*, 236 Ariz. 232, ¶ 26 (App. 2014).

¶10 Denson principally argues that, because there was "no evidence whatsoever" that any smoke shop employee was involved in the drug transactions, "there was an insufficient nexus between the drugs to be seized and the place to be searched to justify a reasonable belief that drugs would be found *at that time*." Denson is fundamentally incorrect. There need not be a nexus between an employee of the smoke shop and the potential presence of illegal drugs; there need only be a nexus, based upon facts known by the officer seeking the warrant, between the place to be searched and the potential presence of illegal drugs. *See State v. Carter*, 145 Ariz. 101, 110 (1985). Whether or not any employee or even the owner of the smoke shop were involved in any illegal activity is immaterial—the

question is whether there existed probable cause to believe that illegal drugs would be found on the premises itself. *Id.*

¶11 The evidence presented to the judge to obtain the warrant was that on the evening of March 31, Harpo told Edwards they needed to go to the smoke shop for the cocaine Edwards wanted to buy. Harpo entered the shop, went into a back room not open to the public, and then left, after which Harpo provided the cocaine to Edwards. Edwards obtained a search warrant the next morning. A reasonable person would believe, even absent the evidence related to the February purchase, that illegal drug sales were occurring on the shop premises on the evening of March 31 or at least that drugs were there to be found, and that illegal drugs might still be present the next day. Consequently, based solely on the circumstances of the March 31 drug purchase, although bolstered by the evidence of the February purchase, probable cause supported the issuance of the search warrant, and the trial court did not abuse its discretion in denying Denson's motion to suppress.

¶12 At the suppression hearing, Denson also offered several explanations for how Gil and Harpo might have obtained the cocaine other than from within the shop, including that each might have already had the drugs on his person when he entered the shop, that they bought it from someone other than Denson while inside, or, as to Harpo's transaction, that the drugs were actually purchased outside the shop. Notwithstanding such possible alternate explanations, probable cause does not require an actual showing of criminal activity or the actual presence of contraband, only a probability of criminal activity or the presence of contraband. *See Sisco*, 239 Ariz. 532, ¶ 15. The probability of each existed here.

Disposition

¶13 For the foregoing reasons, we affirm Denson's convictions and sentences.